No. 4065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. O. HARRISON COMPANY, A Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Assistant United States Attorney.
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 36085

No. 4065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. O. HARRISON COMPANY, A Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This is a writ of error to the United States District Court for the Northern District of California to reverse an order of that court made in a criminal case refusing to grant to petitioner its application for a lien upon the proceeds of the sale of an automobile.

The record consists substantially of a bill of exceptions from which it appears, among other things,

that heretofore one Jack Modesti was informed against for unlawfully transporting intoxicating liquors; that he pleaded guilty on March 17, 1923, and was sentenced to pay a fine of $400.00 with an alternative; that on March 21, 1923, in the same proceeding the court duly made and entered its order for the sale of the automobile, the said order of sale, omitting titles, being as follows:

> "It appearing to the satisfaction of the Court that the above-entitled defendant was on the 17th day of March, 1923, convicted of illegally transporting intoxicating liquor in a certain automobile hereinbefore described, which said automobile was, at the time of the arrest of said defendant, seized by and still is in the possession of the Federal Prohibition Director for the State of California, and no good cause to the contrary being shown by the owner of said automobile;
>
> IT IS HEREBY ORDERED that said automobile, to wit, an Essex Touring Car, License No. 604,483, be sold at public auction by the United States Marshal for the Northern District of California, at the Post Office Building, 7th and Stevenson Streets, City and County of San Francisco;
>
> IT IS FURTHER ORDERED that the said Marshal, after deducting the expenses of keeping the said automobile, fee for seizure and the cost of the sale, shall pay all liens, according to their priorities, which are established as being *bona fide* and as having been created without the lienor having any notice that the said auto-

mobile was being used or was to be used for the illegal transportion of liquor at the time of the seizure thereof, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts.

R. S. BEAN,
United States District Judge.

Dated: March 22, 1923."

On March 29, 1923, the petitioner, H. O. Harrison Company, a corporation, filed in the same proceeding its application for the allowance of a lien in its favor upon the proceeds of the sale of the said automobile. The said application appears at page 31 of the transcript of the record and shows that theretofore on April 14, 1922, applicant had sold to Modesti the said car under a conditional sales contract under the terms of which title was retained by applicant until the purchase price was fully paid; that before the completion of the payments by Modesti, and while the contract was in full force, on December 14, 1922, Modesti was arrested, charged with transportation of intoxicating liquor in violation of the "National Prohibition Act," and the automobile seized by the government; that on March 17, 1923, Modesti was convicted and fined; that the unpaid balance due and to become due under the said contract from Modesti was $198.06, with interest. The application further showed:

"That applicant had no knowledge or reason to believe that said automobile would be used for transportation purposes in violation of the

> Federal Prohibition Act and that applicant had no notice that said vehicle was being used or was to be used for illegal transportation of liquor or for any purpose in violation of law."

The application was verified by one King, described as the auditor of the company. On April 3, 1923, a hearing was had upon the application at which the court saw and considered the papers and documents previously filed in the case and which are set forth in the bill of exceptions and also the conditional contract of sale referred to in the application. This conditional contract appears at page 34 of the Transcript of Record *in extenso*. It is "an agreement to sell and to buy" and in the form of contract usually known as a "conditional sales contract." It provided in paragraph 5 thereof:

> "The *title* to the said automobile herein described, including parts, accessories and extra equipment, now or hereafter attached to or used in connection with said automobile *shall remain solely in the party of the first part until all of the said payments are made and all of the conditions herein contained are fully complied with.* Possession of said automobile shall give the party of the second part no title or interest therein and no rights except as herein provided."

Another significant provision of the contract appears as paragraph 2 thereof, respecting insurance against confiscation.

The bill of exceptions recites that further evidence

in support of the allegations of the application was introduced and no evidence to the contrary introduced by the government. On April 14, 1923, the court denied the application. A copy of the court's opinion appears at pages 13 to 17 of the Transcript of Record.

We believe that the solution of the controversy thus placed before this court involves the consideration of the two propositions only:

a. Was petitioner corporation's application limited to a claim against the proceeds of the sale as a *lienor* upon the automobile, and

b. Was it, under its contract, in fact such a *lienor?*

ARGUMENT.

A. THE APPLICATION OF PLAINTIFF IN ERROR WAS MADE, BASED AND LIMITED SO AS TO CONFINE IT STRICTLY TO A CLAIM OF A "LIENOR" AGAINST THE PROCEEDS OF THE SALE OF AN AUTOMOBILE PROPERLY SOLD.

The petitioner's application was made under Section 26 of Title II of the "National Prohibition Act," *Barnes Federal Code, 1923 Supplement,* Section 8352a. The applicant proceeded in the criminal case as an intervenor in a summary proceeding, and unless it showed a case under that section its application was properly denied. It is manifest both from the phraseology of the application as well as from the showing made that it proceeded under the

particular portion of the said section relating to *liens*. In the opening brief filed here it avowedly bases its right upon such theory. Whatever question may exist as to the meaning of portions of this section, it is quite clear that it contains a different provision regulating the rights of *"owners"* of seized cars from the provision relating to the rights of persons who are merely *"lienors."* It is clearly provided that upon conviction of the person so arrested the court "unless good cause to the contrary is shown by the owner" shall order a sale by public auction of the property seized. A subsequent clause provides that after the sale the officers shall pay all liens established by intervention or otherwise at said hearing or in any other proceeding brought for said purpose as being *bona fide,* and upon the further condition that it is established that the lien was "created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor."

Manifestly the very terms of the section compel the construction that the respective rights of "owners" and of "lienors" in a seized car fall into different categories, are regulated by different provisions, and are to be vindicated in different proceedings.

The showing of innocence or of non-participation in crime to be made by a mere lienor is specifically provided. What a *lienor* has to do is measured by the express terms of the statute. He needed only

show that his lien is *bona fide,* and that (referring to a past time) it was *created* without the lienor having any notice, etc. Such a lienor is not required to show that he did not have knowledge that the car was afterwards used for illegal purposes.

On the other hand one who comes in as an *owner* and who thus presumably had some power over the custody of the car, is required to show "good cause to the contrary" in respect of a sale about to be ordered. As Judge Dooling well said in the case of

U. S. v. Montgomery, 289 Fed. 125, 126,

> "It is to be observed that the court shall order a sale of the car 'unless good cause to the contrary' is 'shown by the owner.' What constitutes such 'good cause' on the part of the owner is nowhere specified, but as to a lienor it is declared sufficient to show that the lien was bona fide and created without the lienor having any notice that the vehicle was being used or was to be used in the illegal transportation of liquor. The difference between the provisions applicable to owners and those applicable to lienors is significant. It is not unreasonable to suppose that Congress had in mind the fact that an owners may determine who shall have the use of a vehicle, and thus in a measure control such use, while a lienor may not, because he is at no time entitled to its possession. It seems, therefore, to me that the 'good cause' required to be shown by the owner means something more than the lack of notice of illegal use required on the part of the lienor."

It has been held, for example, that such a showing to be made by the owner must exclude the fact that he has been negligent in permitting the unlawful use.

> *U. S. v. One W. W. Shaw Automobile, etc.,* 272 Fed. 491.
>
> Same case in Circuit Court of Appeals, 6th Circuit, as *Pittsburgh Taxicab Co. v. U. S.,* 281 Fed. 669.

It being provided that the car shall be ordered sold unless good cause is shown to the contrary, the burden is on the claimant to satisfy the court.

> *U. S. v. Polowy,* 286 Fed. 297.

It thus appears that the showing to be made by the owner of a seized car is to be made before the order of sale and that the burden upon him to show good cause against such sale is manifestly to be more onorous than in the case of a mere lienor. The rights of such an *owner* are to be tried out when the court is considering the question of ordering the sale. If such order be taken against him improperly or inadvertently, the court has power within the same term to reconsider or vacate its order.

> *U. S. v. Brockley,* 206 Fed. 1001.

With such an understanding of the meaning of the section it is clear that, if the rights of plaintiff in error were those of an *owner* and distinguished from those of a *lienor,* it should have made its showing at the time the sale was ordered in the case at

bar. And more than that, it is now conclusively presumed that it did attempt to make such a showing or had no such showing to make, for it is recited in the Bill of Exceptions, Transcript of Record, page 28, "on March 21, 1923, in the said proceeding the said court *duly made and entered its order for the* sale of one Essex Touring Car," a true copy of the order being set forth, and from the order itself appears the recital "that no good cause to the contrary being shown by the owner of said automobile, etc." Thus it appears that the present applicant either sought to show good cause to the contrary and failed, or realizing that it could not meet the burden resting upon an owner, refrained from attempting such showing, and sought to obtain relief by making the minimum showing required from a lienor.

And it may be of interest to note in passing that it is unlikely that it could have impressed the court in that behalf in view of the provision of its own contract where it required the conditional sale vendee to insure in its favor against "confiscation" of the car (paragraph 2 of contract. See photostat in Transcript of Record). Such provision of its contract manifestly had a purpose. No seizure by any foreign invader was in prospect, so that the petitioner could have had no other purpose than to insure against confiscation of the car for unlawful use, the unlawful use most to be anticipated being the violations of the "National Prohibition Act."

And while such question is not now before the court, we should feel most confident in urging its consideration upon a trial court in any such case where a conditional vendor seeks to have the car returned to him.

It is to be noted that the only order sought to be reviewed here is the order refusing to allow the applicant to participate as a *lienor* in the proceeds of the sale of the car. Plaintiff in error has not taken any steps to review the order directing the sale of the car, and the Bill of Exceptions here does not contain any statement of what transpired when the court made its order, nor show what testimony was given or received, or what showing was made to the court to induce the making of the order, nor could the Bill of Exceptions on the present appeal properly show anything in that connection. We have instead the recital in the Bill of Exceptions that the order in question was *duly made* and entered, and we have a recital in the order itself that no cause to the contrary was shown.

Since the order of sale has become a finality in all respects, it is manifest that no party in interest is to be heard in any subsequent proceeding unless he comes within the express terms of the statute and shows that he is a *lienor* and of the class and character therein protected.

We, therefore, urge that it is established from the phraseology of the application, from the fact that the alleged showing of good faith is of the mini-

mum character required of a lienor, from the statement of the situation appearing from the Bill of Exceptions, as well as from the Opening Brief of the plaintiff in error herein filed, that the application of petitioner is strictly limited to an application as a lienor to participate in the proceeds of the sale of a car properly sold, and that petitioner did not come before the court seeking to vindicate any rights as an owner.

B. PETITIONER UNDER ITS CONTRACT WAS NOT A LIENOR EITHER UPON THE CAR OR UPON THE PROCEEDS OF THE SALE THEREOF.

That the vendor in a conditional sales contract is not a lienor is manifest. He reserves title to himself until all of the purchase price had been paid. In the event of non-payment he is not required either to foreclose any lien or mortgage, or to sell the property; he has the option of recapture just as any other owner or person holding the title would have.

As Judge Partridge pointed out in his decision incorporated in the Record, the title remained in the vendor and if the property were destroyed, the loss falls upon him.

The same ruling was made by Judge Dooling in the case of

U. S. v. Montgomery, 285 Fed. 125.

in which he declared that a contract of the character of the contract here involved had none of the essential requisites of a chattel mortgage; that it did not create a lien in the vendor with title passing to the purchaser, but that it reserved title absolutely in the vendor, and that in such a case we are not dealing with the lien or assisting rights accorded him by the particular section, but with an owner who has voluntarily parted with the possession and control of the car.

In the decision of Judge Rudkin in the case of

U. S. v. Smith & Tucker,

printed as an appendix to the brief of counsel, it was said of a similar contract "that such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this State." While that was said in reference to the State of Washington, the law of California is not dissimilar.

Some reliance is placed in the case of

U. S. v. Sylvester, 273 Fed. 253,

wherein the District Court of Connecticut had occasion to consider the rights of a conditional vendor under the section quoted, 26. The case is not authority, however, against the positions here assumed by us. In that case such proceedings as were had were had previous to the ordering of a sale, and while in the course of the opinion some confusion may be made in the use of the words "lien" or

"claim," the real question before the court was whether such a conditional vendor *showed good cause course* against an order of sale.

It may be true that there is nothing in the nature of his contract that would prevent him in any or all cases from showing such good cause. That question does not arise here. The case of *U. S. v. Sylvester, supra,* does not hold that a conditional vendor having suffered a sale of the car to be ordered, has the right as a *lienor* to participate in the proceeds of the sale upon the minimum showing required by Section 26 to be made by such lienor.

Plaintiff in Error places some reliance upon the rulings in the cases of

U. S. v. Sylvester, and
U. S. v. Smith and Tucker, supra.

As we have noted, these cases are easily distinguishable from the case here in that in both cases the application was made by conditional sales vendor previous to the order of sale, and in which, as owner, the conditional sales vendor sought to show good cause to the contrary and thus prevent a sale and secure the return of the car to himself. In neither of the cases did the applicant avowedly or in effect proceed as a lienor under the subsequent provision of the statute authorizing a lienor to participate in the proceeds of the sale. In the *Smith and Tucker* case the government made a claim that such a vendor was a lienor with a view to securing for

the government part of the proceeds of the sale. This claim was denied, the court holding that he was not a lienor. It is true that in both cases the court granted the application in part. It was not willing to return the car outright, but deemed it just to award to the conditional sales vendor the amount of its interest. We do not dispute that there may be cases where the ownership of the car is so divided among guilty and innocent persons that the court in its discretion could frame procedure so as to deal justly with the situation. It might have required an appraisement and a payment of the difference to be made to the government by the applicant, or it might have done as it did in the cases cited, direct a sale and the proceeds to be divided accordingly. The mere fact that such a sale would be analogous to the case of a lienor is of no significance. The court's action does not proceed upon the theory that a lienor is establishing his interests in the proceeds of a sale previously had.

While we do not concede that the court should not in its discretion in many cases of sales upon conditional contracts refuse to give any relief to a conditional vendor, nevertheless if the matter is not wholly within the discretion of the lower court, there are many facts of important bearing to be considered by the court to enable it to prevent an abuse. And if in a possible case, a conditional vendor can show an entire and absolute good faith and thus be entitled to have his interest protected, no objection to the court's framing a procedure similar to that

in the Sylvester or Smith and Tucker cases so as to forfeit the equitable interest of the vendee and yet recognize the interest of such innocent vendor is seen. But, as we have above indicated, these questions do not arise here because petitioner apparently advisedly refrained from attempting to show any good cause to the contrary at the time the sale was ordered and ordered, as it must now be conclusively presumed, in a proper case and upon a proper showing.

We, therefore, respectfully urge that no error was made by the court below in denying applicant's motion, and the order should be affirmed.

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Assistant United States Attorney.
Attorneys for Defendant in Error.